

*a***BANK UTAMA (MALAYSIA) BHD****v.****HECTARES PACIFIC SDN BHD & ORS***b*

HIGH COURT SABAH AND SARAWAK, SIBU
CLEMENT SKINNER J
[CIVIL SUIT NO: 22-33-2000]
19 MAY 2003

c

CIVIL PROCEDURE: *Service - Setting aside - Writ of summons - Whether validity of writ lapsed at time of service - Service of legal process pursuant to deeming provisions in contract - Whether proper and valid - Whether binding on defendant - Rules of High Court 1980 O. 6. r. 2(1)(b), O. 10 r. 3(1), O. 12 r. 4, O. 92 r. 4*

d

The plaintiff had granted overdraft facilities to the first defendant and upon default sued the second defendant guarantor ('the defendant') for repayment thereof. It was not disputed that by cl. 24 of the guarantee, any legal process between the parties were "deemed to have been duly served on the 5th day following that on which it was posted". The plaintiff, having issued the writ of summons and the statement of claim on 30 March 2000 ('the writ'),
e encountered difficulties in serving the writ, and it was not until 23 March 2001, six days before the writ was due to expire, that it managed to post the writ to the defendant's proper address in Petaling Jaya. By 28 March 2001, however, the plaintiff was still unsure whether the relevant AR Card had been received by the defendant, and that being so, it applied for and obtained an extension
f of the writ for a further 6 months from 30 March 2001. Before extending the writ, the plaintiff had also applied for leave to amend the same whereupon the application was heard and granted on 2 April 2001 ('the amended writ'). In the meanwhile, on 4 April 2001 the defendant received the AR posted writ, and following that, on 23 April 2001, obtained leave to enter conditional
g appearance in the action and a stay order of all proceedings against him. The stay order, however, was not served on the plaintiff until 31 May 2001, by which date, both the amended writ and the renewed amended writ had been served on the defendant (on 30 April 2001 and 15 May 2001 respectively).

h

The defendant challenged the validity of the service processes and in the circumstances applied to set aside the writ, the amended writ and the renewed amended writ on the grounds, *inter alia*, that: (i) the validity of the writ had expired by the time it was served on him on 4 April 2001; (ii) the validity of the amended writ, having been served on 30 April 2001, had lapsed by virtue

i

of the stay order of 23 April 2001; (iii) service of the renewed amended writ was an abuse of process, being the third time the writ was served on him; and (iv) the order of 28 March 2001 extending the validity of the writ for 6 months was improperly obtained or granted. This apart, it was the defendant's stand that clause 24 of the guarantee was null and void, being an attempt to contract out of the Rules of the High Court 1980 ('the RHC'). The plaintiff, in retort, applied to set aside the order for stay on the grounds that O. 12 r. 7 of the RHC, under which the order was obtained, did not provide for the grant of stay of proceedings, and further that there was no basis for the court to exercise its discretion under O. 92 r. 4 RHC to grant stay.

Held (allowing the plaintiff's application; dismissing the defendant's application):

- [1] The defendant had expressly agreed to service of legal process being so effected on him in the manner described in cl. 24 of the guarantee. Further O. 10 r. 3(1) RHC gives effect to a clause in a contract such as cl. 24 by deeming the writ to have been duly served on a person if it is served in such manner or such place as may be specified in the contract. (p 94 f)
- [2] The plaintiff had sufficiently established that it had posted the writ to the defendant on 23 March 2001 by AR Registered Post in accordance with the provisions of cl. 24 of the guarantee and that the deeming provisions therein and in O. 10 r. 3(1)(b) would inevitably apply. As service of the writ on the defendant must be regarded as having been effected on 28 March 2001, at which time it remained valid for service, the defendant's complaint of being served with an expired writ was without merit. (p 96 d-e)
- [3] The contention that cl. 24 was an attempt to contract out of RHC, and therefore against public policy, was misconceived. Clause 24 pertained to the date of service, and not the 'time' to enter appearance after service. Properly understood, cl. 24 did not attempt to do away with or curtail or shorten the 'time' within which the defendant might enter an appearance in the action. (pp 97 f-g & 98 a-c)
- [4] It was idle of the defendant to have complained about service of the amended summons when he himself had not been taking steps to serve the stay order on the plaintiff until 31 May 2001, which was well after amendment had been made to the writ. This aside, there was no provisions in the RHC stating that once a writ was served on a defendant but thereafter amended, the amended writ must be re-served on him during its original or extended validity period. (pp 99 g & 100 a-b)

- a** [5] The plaintiff had good reasons for serving the writ for the third time. On the first, the plaintiff was undertaking personal service of legal process on the defendant. On the second, it was a copy of the amended writ that was served, in compliance with the requirement of O. 20 r. 1(2) RHC. What was served on the third occasion was the amended writ with the endorsement “renewed for 6 months”. So what was being served was the
- b** duly extended writ, in its amended form. In the circumstances herein, what the plaintiff did was understandable. It was not an abuse of process, but a genuine attempt to show that if, for any reason, service on the first occasion was invalid because the writ had expired, then service on the third occasion remained valid and effective. (p 101 a-f)
- c**
- d** [6] Since the plaintiff did not rely on the extension order of 28 March 2001 but on the deeming provisions of cl. 24 of the guarantee and O. 10 r. 3(1)(b) RHC, the grounds relied on by defendant in his fourth application became academic. In any case sufficiently good reasons had been placed before the SAR to enable him to exercise his discretion to renew the validity of the writ. (p 104 a, f)
- e** [7] The law is clear that O. 12 r. 7 RHC may not be resorted to by a defendant to obtain a stay of proceedings. If therefore the order was obtained under this rule, it was improperly obtained. There was also no basis upon which the court could be moved to exercise its inherent discretion under O. 92 r. 4 RHC and grant a stay order. That being so, the plaintiff’s application to set aside ought to be allowed. (pp 105 g & 109 e)
- [Defendant given 14 days to file defence.]
- f** **Case(s) referred to:**
Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 SC (**foll**)
Arab-Malaysian Merchant Bank Bhd v. Dominance Resources Sdn Bhd [2002] 5 CLJ 1 HC (**foll**)
Badrul Zaman PS Md Zakariah v. Jabatan Penyiaran Radio dan Televisyen Malaysia [2001] 2 CLJ 623 HC (**refd**)
- g** *Chellapa K Kalimuthu v. Sime UEP Properties Bhd* [1999] 3 CLJ 247 CA (**refd**)
Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA (**refd**)
Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd [2000] 3 CLJ 361 HC (**refd**)
- h** *Lloyd Tirestino Societa v. Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27 (**refd**)
Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1990] 1 MLJ 317; [1989] 1 LNS 115 HC (**foll**)

i

Matchplan (M) Sdn Bhd & Anor v. William D Sinrich & Anor [2000] 7 CLJ 212 HC (*refd*) **a**

TA Securities Berhad v. Ng Yen Ling [2001] 1 CLJ 102 HC (*fol*)

Tai Choi Yu v. The Government of Malaysia [1993] 3 CLJ 405 HC (*refd*)

Tradium Sdn Bhd v. Zain Azahari Zainal Abidin [1996] 2 CLJ 270 CA (*refd*)

Trans Resources Corporation Sdn Bhd v. Sanwell Corporation & Anor (No 2) [1999] 3 CLJ 215 HC (*refd*) **b**

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 2, O. 6 rr. 2(1)(b), 7(1), (2), (3), O. 10 r. 3(1)(b), O. 12 rr. 4, 6, 7, O. 14, O. 20 r. 1(2), O. 53, O. 92 r. 4

For the plaintiff - Stephen Lu; M/s SK Ling & Co **c**

For the 2nd defendant - Sunny Si; M/s Si & Assocs

Reported by WA Sharif

JUDGMENT

Clement Skinner J: **d**

There are five applications before me. Before I say what they are, I shall state briefly the facts giving rise to them.

The plaintiff, a licensed bank, granted overdraft facilities to the first defendant in the sum of RM3,092,602.20. The second and third defendants stood as guarantors to the facility granted to the first defendant. The plaintiff, claiming that the first defendant was in breach of its obligations to repay the amounts due under the overdraft facility, and also that the second and third defendants were in breach of their obligations to pay the sums due under the guarantee, caused a writ of summons together with a statement of claim (hereafter together referred to as ‘the writ’) to be issued out against them on 30 March 2000. **e**
f

I should mention here that as the writ was issued out prior to the amendment made to O. 6 r. 7(1) Rules of the High Court 1980 (‘the RHC’) which took effect on 22 September 2000, it remained valid for service in the first instance for 12 months beginning with the date of its issue ie, until 29 March 2001. **g**

Upon issue of the writ the plaintiff attempted service of the same on the second defendant but says it encountered difficulties in doing so. It is best that I now set out a chronology of relevant events that occurred in this suit as it will put the five applications that have been filed into their proper context. **h**

Within about 11 days of the issue of the writ, that is on 11 April 2000, the plaintiff took steps to serve the same on the second defendant by posting it by AR Registered post addressed to him at 25 Upper Lanang Road, Sibul **i**

- a* (hereafter “the Sibü address”) because by cl. 24 of the guarantee he had signed on 20 February 1997, that was the address at which the second defendant had agreed service of any legal process could be effected on him. The second defendant had also agreed by the same clause in the guarantee that if any legal process was effected on him by prepaid registered or ordinary post at
- b* his address specified in the guarantee or at his last known place of business or registered address, then such legal process shall be deemed to have been duly served on the fifth (5th) day following that on which it was posted, notwithstanding that the said legal process may be subsequently returned undelivered. Clause 24 in the guarantee reads:
- c* Any demand for payment or service of any legal process may be made or effected by prepaid registered or ordinary post addressed to me/us or to each of us at my/our address specified herein or at my/our last known place of business or registered address and such demand or legal process shall be deemed to have been duly served on the fifth (5th) following that on which it is posted,
- d* notwithstanding that the said demand or legal process may subsequently be returned undelivered by the postal authorities. “Legal process” shall mean all forms of originating process, pleadings, interlocutory applications of whatever nature, affidavits, orders and such documents, other than the aforesaid, which are required to be served under any legislation or subsidiary legislation or by the terms of this Guarantee.
- e* The address specified by the second defendant in the guarantee is the Sibü address. As evidence of posting of the Writ to the second defendant on 11 April 2000, the plaintiff produced an AR Card issued by Pos Malaysia Berhad but the AR Card shows that the writ was acknowledged by a company called “Umas Sdn Bhd.” of 2A, 2nd Floor, Brook Drive P.O. Box 1548, 96000
- f* Sibü. On 30 May 2000 the plaintiff made another attempt at serving the writ on the second defendant by posting it by AR Registered post addressed to him at the same address ie, the Sibü address. As evidence of posting on this second occasion, the plaintiff produced an AR Card issued by Pos Malaysia Berhad but again the AR Card was returned showing that the writ had been
- g* acknowledged by Umas Sdn Bhd. The AR Cards referred to above are attached as exhs. ‘3’ and ‘4’ to the affidavit of Lim Chuon Hong affirmed on 28th March 2001 which itself forms exh. ‘LBC1’ of the affidavit of Lau Buong Chin affirmed on 27 June 2001 and filed on the same day.
- h* Relying on the fact that service of the writ had been effected on the second defendant at his Sibü address, the plaintiff then sought to seal a judgment in default of appearance against him but the High Court Registry would not allow the plaintiff to do so as the Registry apparently took the view that personal service had not been properly effected.
- i*

Then some time on 20 June 2000 the second defendant wrote to the firm of advocates acting for the plaintiff, informing them that he was residing at Petaling Jaya at 2109 HR2 Riana Green, Jalan Tropicana Utara, 47410 Tropicana, Petaling Jaya (hereafter “the Petaling Jaya address”), and that he could be served at that address by prior appointment. There does not appear to have been a response from the plaintiff to this letter.

On 26 February 2001 the second defendant again wrote to the plaintiff’s Advocates, referring them to his earlier letter of 20 June 2000 and noting that the plaintiff had yet to make arrangements to serve the writ on him. This time, there was a response from the plaintiff. Its advocates sent the writ by AR Registered post to the second defendant on 23 March 2001, addressed to him at the Petaling Jaya address. The second defendant now contends that the plaintiff’s advocates could not have posted the writ to him on 23 March 2001 as it claims to have done, because while the plaintiff’s Advocates’ covering letter enclosing the writ is dated 23 March 2001, the “record of posting” (ie, the Pos R & P 1B form) on which the Post Office is said to have acknowledged receipt of the plaintiff’s Advocates’ covering letter for posting by Registered Mail, is dated 22 March 2001. More will be said on this later.

Returning to the narrative, the second defendant received the writ sent to his Petaling Jaya address on 4 April 2001, whereupon he took certain steps which I shall go into in more detail after I mention what the plaintiff had done between the date of posting the writ to the Petaling Jaya address and its receipt by the second defendant.

The plaintiff was aware that for purposes of service, the validity of the writ would expire on 29 March 2001. Although the plaintiff’s advocates had posted the writ to the second defendant on 23 March 2001 addressed to him at his Petaling Jaya address, they were still, by 28 March 2001, unable to confirm whether the writ had been received as the AR Card had not been returned to the plaintiff’s advocates. So on 28 March 2001 the plaintiff applied by way of an *ex parte* Summons-in-Chambers, (under O. 6 r. 7(2) RHC), that the writ be extended for a further six months from 30 March 2001, and was granted the extension the same day.

Before extending the validity of the writ, the plaintiff had applied for leave to amend the same by including an indorsement of its claim in the writ. Its application was heard and granted on 2 April 2001. It should be mentioned that leave to amend was sought for as the other two defendants in the action ie, the first and third defendant, had already been served. They appeared by counsel on the hearing of the plaintiff’s application to amend.

- a* As I had indicated earlier, the writ, in its unamended form, that was posted to the second defendant on 23 March 2001, was received by him on 4 April 2001. On 23 April 2001 the second defendant applied for, and was granted, leave to enter a conditional appearance in this action. Pursuant to the leave granted him to do so, the second defendant has applied to set aside the writ
- b* as well as the service thereof on him, inter alia, on the ground that by the time the writ was served on him on 4 April 2001, its validity had expired or lapsed. This application (in encl. 89) is one of the five applications before me and I shall refer to it as the second defendant's 1st application.

- c* It must be mentioned here that when the second defendant applied, on *ex parte* basis, for leave to enter conditional appearance, he also applied for, and was granted, an order that all further proceedings against him in this action be stayed until the determination of his application to set aside the writ and service thereof on him. I must also mention here that after the second defendant had obtained the order for a stay of proceedings against him on an *ex parte* basis on 23
- d* April 2001, he did not take any steps to serve the order of stay on the plaintiff until 31 May 2001.

- e* It is unfortunate that the second defendant had failed to immediately serve the order of stay on the plaintiff because in between 23 April and 31 May 2001, the following events took place. On 30 April 2001 the plaintiff served the amended writ on the firm of advocates acting for the second defendant as a result of which, the second defendant has applied to set aside the amended writ as well as the service thereof on him, principally on two grounds: (a) that the validity of the amended writ had expired or lapsed by the time it was served on his advocates on 30 April 2001 and (b) an order for stay of proceedings
- f* had already been granted by the time the amended writ was served. I shall hereafter refer to this application (in encl. 91) as the second defendant's 2nd application.

- g* The next event which took place was that on 15 May 2001, the plaintiff served on the second defendant's advocates the renewed amended writ together with the Order dated 28 March 2001, extending the validity of the same as a result of which, the second defendant has applied to set aside the renewed amended writ (renewed for six months from 30 March 2001) as well as the service thereof on several grounds, namely, (a) this was the third time the writ was being served on him and in the circumstances constitutes an abuse of process;
- h* (b) the renewed amended writ was not marked with an official stamp pursuant to Form 5 RHC showing the period for which its validity had been extended; (c) the renewed amended writ served on 15 May 2001 is not a valid nor proper "sealed" copy; (d) the plaintiff had also failed to amend the endorsement on

i

the renewed amended writ which stipulates that “This writ may not be served more than twelve months after the above date unless renewed by order of court.”; (e) service of the renewed amended writ was invalid since all proceedings in the action had been stayed on 23 April 2001 and the plaintiff ought to be aware of the same. I shall refer to this application (in encl. 108) as the second defendant’s 3rd application.

The second defendant has also applied to set aside the *ex parte* order granted to the plaintiff on 28 March 2001, extending the validity of the writ for 6 months from 29 March 2001 on the grounds that (a) there was no basis nor materials upon which the plaintiff could apply to extend the writ; (b) there was unexplained delay on the part of the plaintiff in serving the writ; (c) there was non-disclosure of material facts in the plaintiff’s application, which was made *ex parte*. I shall refer to this application (in encl. 12[2]) as the second defendant’s 4th application.

The plaintiff on its part complains that the second defendant should never have obtained the order to stay all proceedings against him in this action and has applied to set aside the stay order on the grounds that it was improperly obtained as (a) it was obtained on an *ex parte* application made under O. 12 RHC, which order does not provide for such stay to be applied for; (b) there was no basis for the application for stay. I shall refer to the plaintiff’s application (in encl. 17[2]) as the 5th application.

Although the second defendant has filed in the four separate applications which I have just described, many of the issues raised in them are connected in one way or another to one central question, the resolution of which will be decisive in determining those issues and indeed his four applications generally. That question is this: When was service of the writ effected on the second defendant? Was it on 4 April 2001 as contended by him, or was service effected on him on 28 March 2001 as contended by the plaintiff? The answer to the question posed is important because if the writ was served on the second defendant before it had expired (on 29 March 2001), then the second defendant’s attack on the order of 28 March 2001 which extended the validity of the writ, as well as his attack on the service on him of the writ and amended writ and extended amended writ, lose much of their force. The same may be said about the second defendant’s complaint about the writ not bearing the stamp pursuant to Form 5 RHC showing the period for which the validity of the writ had been extended, and of his complaint about the plaintiff’s failure to amend the note on the amended writ which stipulates that “This writ may not be served more than twelve months after the above date unless renewed by Order of Court”.

- a* It is with what I have just stated in mind that I now turn to consider the five applications before me. I shall consider the second defendant's 1st application first as it is there that the second defendant seeks to set aside the writ as well as its service on him on the ground, *inter alia*, that when he received the writ on 4 April 2001, its validity had already lapsed or expired.
- b* Now, since the writ was issued out on 30 March 2000 and remained valid for service in the first instance for 12 months therefrom ie, until 29 March 2001, in order to ascertain whether the writ was still valid when it was served on the second defendant, it will be necessary to determine the date when service was effected on the second defendant. On the one hand, the second
- c* defendant contends that service was effected on him only on 4 April 2001 because that was the date on which he physically received the writ at his Petaling Jaya address, whereas, on the other hand, the plaintiff contends that it is entitled to rely on the deeming provisions of cl. 24 of the guarantee executed by the second defendant, the terms of which I have already set out
- d* earlier. According to the plaintiff, since the writ was sent by AR Registered post addressed to the second defendant at his Petaling Jaya address on 23 March 2001, it shall, in accordance with the provisions of cl. 24 of the guarantee, be deemed to have been duly served on the fifth (5th) day following that on which it was posted ie, on 28 March 2001, which is a day before the
- e* writ had expired.

- In my judgment, the plaintiff is correct in its contention regarding the date on which service of the writ was effected on the second defendant and I say so for the following reasons. The second defendant had expressly agreed to service of legal process being so effected on him in the manner described in cl. 24 of the guarantee. Further, O. 10 r. 3(1) RHC gives effect to a clause in a contract such as cl. 24 by deeming the writ to have been duly served on a person if it is served in such manner or such place as may be specified in the contract. Therefore, for the second defendant to seek to contend that the date on which he actually received the writ is the date on which service was effected on him is contrary to the deeming provisions of cl. 24 of the guarantee by which he is bound. It is also contrary to the deeming provisions in O. 10 r. 3(1)(b) RHC. In *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1, cl. 17 of the guarantee sued upon in that case contained a clause similar to cl. 24 of the guarantee in this case (except that service of legal process was not included in cl. 17), in that "any notice of demand may be served ... by sending the same through the post ... to the last known place of address of the person to be served and shall be deemed to be served on the day following that on which it was posted." The appellant there made a demand on the respondent by sending it by AR Registered post but the AR Card was not returned and
- g*
- h*
- i* the respondent denied the notice had been properly served. The learned trial

judge held that the burden was on the appellant to prove that the notice of demand had been received by the respondent and that service could be said to have been effected only upon the return of the acknowledgement AR Card. On appeal, the Supreme Court overturned the decision and held (on the service point) at p. 5:

In the context of clause 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR Card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

What was said by the Supreme Court in *Lim Tow Choon's* case was said in the context of the service of a letter of demand, but I see no good reason why what was said would not apply with equal force to the service of legal process pursuant to a term in a contract and in fact has been so applied in the case of *TA Securities Berhad v. Ng Yen Ling* [2001] 1 CLJ 102.

In applying the ratio in *Lim Tau Choon's* case to the facts of our case, I am mindful of the fact that the second defendant contends that it is inherently incredibly that the plaintiff could have posted the writ to him on 23 March 2001 as alleged, for the reasons which I indicated earlier in this judgment. I regret I find no merit in the second defendant's contention and have no difficulty in finding that the writ was indeed posted to the second defendant on 23 March 2001. I say so for the following reasons: The plaintiff has explained why the "record of posting" or "Kiriman Banyak Barang-barang Berdaftar (Pos R & P 1B form) shows a date "22 March 2001" while its Advocates' covering letter to the second defendant is dated 23 March 2001. The plaintiff's Advocates' despatch clerk one Rudy Bin Bolhan explained in his affidavit affirmed on 3 July 2001 that the "record of posting" is prepared by the sender of the items mentioned therein and he was supposed to send out three items on 22 March 2001 and so on that day he prepared and dated the record of posting shown as exh. LCB 3 of Lau Buong Chin's affidavit of 18 June 2001, in which items 1, 2 and 3 are shown. But those 3 items did not include the covering letter of the plaintiff's advocates dated 23 March 2001. However, Rudy bin Bolhan explained that due to lateness in time to do so on 22 March 2001, he decided to only send out the three items on the following day. On the following day he was handed another two letters for posting, one of which was the covering letter dated 23 March 2001 enclosing the writ to the second defendant. He made an entry regarding the two letters in the record of posting he had prepared the previous day, as items 4 and 5. Rudy bin Bolhan explained that

- a* all the items listed in the record of posting were then posted on 23 March 2001 when the Post Office put its official chop at the bottom right hand side of the record of posting.

- b* I find the explanation given by Rudy Bin Bolhan perfectly acceptable because what he says about the five items appearing in the record of posting only being received for posting by the Postal Office on 23 March 2001 is borne out by the official chop of the Post Office appearing on the bottom right hand side of that form. A perusal of the form shows that at the bottom of the form at the column “Tandatangan Pegawai Menerima Pejabat Pos”, there appears a signature and a chop. Although it is upside down, the chop bears the date “23 March 2001”
- c*

- I am accordingly satisfied that the plaintiff has sufficiently established that it had posted the writ to the second defendant on 23 March 2001 by AR Registered Post in accordance with the provisions of cl. 24 of the guarantee and that the deeming provisions in cl. 24 and in O. 10 r. 3(1)(b) would inevitably apply.
- d*

- As service of the writ on the second defendant must be regarded as having been effected on him on 28 March 2001, at which time it remained valid for service as it had not expired yet, the second defendant’s complaint about being served with an expired or lapsed writ must be rejected. So too must his complaint about the writ which he received on 4 April 2001 not bearing an official stamp in accordance with Form 5 RHC, showing the period for which the validity of the writ had been extended. Since it was not a “renewed” writ but the “original” unexpired writ that was served on him, the official stamp in accordance with Form 5 was a totally irrelevant requirement.
- e*
- f*

In an attempt to escape the rigours of cl. 24 of the guarantee by which he was clearly bound, the second defendant advanced the following arguments:

- g* (1) the plaintiff’s reliance on cl. 24 of the guarantee is an afterthought and misconceived because if the plaintiff was relying on the deeming provisions in cl. 24, then there would be no necessity for it to have applied to extend the validity of the writ. In having done so, the second defendant says the plaintiff’s stand is illogical, amounts to “blowing hot and cold” and it should be estopped from relying on the deeming provisions of cl. 24. I regret I cannot agree with these arguments. They overlook the important fact that the plaintiff had twice served the writ in accordance with cl. 24 and based on such service had attempted to seal a judgment in default of appearance against the second defendant but was prevented from doing so by the Court Registry as the AR Card had been acknowledged by
- h*
- i*

Umas Sdn Bhd and not the second defendant. Thus, it seems to me that on the third occasion, after the writ was sent to the second defendant by AR post addressed to him at his Petaling Jaya address, the plaintiff was anxious to receive back the AR Card duly acknowledged by him since that is what the court Registry was insisting on as proof of service. It is in that context that the plaintiff's renewal of the writ must be looked at - to seek renewal as a matter of caution so as to keep 'powder and shot' dry while trying to comply with the court's requirements, and not that the plaintiff was not seeking to rely on the deeming provisions in the guarantee. It is also in that context that what was said by Mr. Lim Chuon Hong in his affidavit of 28 March 2001, about the renewal of the writ, must be read.

Further, it is also my view that the second defendant's argument based on approbation and reprobation cannot be upheld in the context of service of legal process because the law, in giving effect to the object behind all service of process i.e. to bring to a defendant's notice that legal action has been commenced against him, prescribes and allows for several modes of service. Thus, in the case of personal service on a person, the law allows for at least 4 modes of service ie, personal service, service by prepaid AR registered post, service according to contract and in appropriate cases, substituted service. If that be the case, and say a plaintiff were to try to serve a writ personally on a defendant but fail to do so and therefore turns to service by post, can the plaintiff be accused of blowing hot and cold in so doing just because he happens to choose to serve the writ by way of personal service first? The answer must surely be "No" for the simple reason that the law allows him to take that course.

- (2) the second defendant next sought to argue that the deeming provisions found in cl. 24 of the guarantee, whereby the parties have agreed that service of legal process shall be "deemed" effected on the 5th day after posting, is invalid as it represents an attempt to contract out of the provisions of the RHC and as such is contrary to public policy and must be struck down. It is the second defendant's contention that because the writ itself and O. 12 r. 4 provides for a time frame to enter appearance e.g. either 10 days or 20 days from the date the defendant is actually served, any attempt to override or to get out of the provisions of the RHC should not be allowed. To press home his point the second defendant gave an example. He said, say for instance a contract contains a stipulation that a writ is duly served on the day of posting via ordinary mail, in such a case the defendant may not have received the writ in time to even enter an appearance! So he submitted that cannot be the law.

- a* I regret that I find the second defendant's contention untenable and thoroughly misconceived. It is very apparent to me from the arguments he has put forward and from the example he has given, that the second defendant is confused between the fact of service ie, the date on which legal process is "served" on the one hand, and on the other hand the "time" to enter appearance after service
- b* ie, the number of days within which an appearance must be entered e.g. within 10 or 20 days, so as to prevent a judgment in default being entered. Clause 24 of the guarantee concerns the former ie, it has to do with the date of service because the "deeming" there is to the fact of service, namely, that the writ shall be deemed to have been duly served on the 5th day following that on
- c* which it is posted. When properly understood, it will be seen that cl. 24 does not attempt to do away with or curtail in any way or even shorten the "time" within which the second defendant may enter an appearance in the action.

I therefore reject the second defendant's aforementioned arguments.

- d* I move on now to consider the other grounds relied on by the second defendant to set aside the writ of summons in his 1st application. They are:

- (i) the writ failed to comply with O. 6 r. 2(1)(b) RHC ie, it was not indorsed with a statement of the amount claimed in respect of the debt now claimed by the plaintiff in this case.

- e* I should mention that while he maintained this objection, the second defendant did not make any submissions on the point because the same issue has been raised many times in other proceedings before me either by him or his co-defendants in those proceedings and I have ruled against the objection. I
- f* have given my reasons why such an objection cannot be upheld in *Arab-Malaysian Merchant Bank Bhd v. Dominance Resources Sdn Bhd* [2002] 5 CLJ 1 and no purpose would be served to repeat them here.

- g* However, I will say that whatever objections the second defendant may have had on the matter, they have been rendered otiose because on 2 April 2001 the plaintiff amended the writ to include such an indorsement. Of course the second defendant has applied to set aside the amended writ which is a matter I shall come to shortly, but I must point out here that the amendment was made before the second defendant served the order of stay on the plaintiff.

- h* (ii) the second defendant also complained that the writ of summons that was served on him was not properly sealed. Again, while maintaining his objection on this ground the second defendant did not make any submission on this point as it has been raised many times in other proceedings before me either by him or his co-defendants in those proceedings and I have
- i*

rejected the objection. I would here point out that the copy of the writ exhibited in the second defendant's application shows that the copy of the writ that was served on him bore on it face the letters "L.S." in a circle, and I have in the case of *Arab-Malaysia Merchant Bank Bhd v. Dominance Resources Sdn Bhd (supra)* given my reasons for saying why the service of the sealed copy of the writ on a defendant is not a requirement under the rules and that serving a copy bearing the letters "LS" in a circle suffices. No useful purpose is served by repeating here what was said there.

For all the above reasons I dismiss the second defendant's 1st application in encl. 98 with costs to the plaintiff.

The 2nd Application (In End. 91)

This is the second defendant's application to set aside the amended writ of summons as well as the service thereof on his advocates on 30 April 2001. I have, when introducing the facts, already stated the chronology in which the amendment occurred. The grounds relied upon by the second defendant in making this application are that:

- (a) the validity of the amended writ had already lapsed or expired by the time it was served (the first ground);
- (b) further or alternatively, he was not properly served with the application to amend before being served with the writ (the second ground);
- (c) in any event, he had obtained an order staying all further proceedings against him (the third ground).

With regard to the first ground, in view of my finding that service of the writ in this action had been effected on the second defendant on 28 March 2001, which was a date within the period of its validity, the question of whether the amended writ was still valid when it was re-served simply does not arise. I know of no provisions in the RHC, nor has the second defendant been able to point out any such rule to me, or to point out to me any decided case which says that once a writ is served on a defendant but thereafter amended, the amended writ must be re-served on a defendant during its original validity period or extended validity period.

With regard to the second ground, I cannot see any basis for the second defendant's complaint because until a defendant is served and enters an appearance to the suit, he is not a party before the court and strictly speaking, until then, there is no obligation to serve any applications made in the suit on him.

- a* With regard to the second defendant's third ground, I find no merit in it. It is completely baseless. It is idle for the second defendant to complain that the plaintiff had taken steps to amend the writ on 2 April 2001 although an order to stay all proceedings against him had been made on 23 March 2001, when the second defendant himself is to blame for not having taken any steps to
- b* serve the plaintiff with the order for stay which had been obtained on an *ex parte* basis, until 31 May 2001 which was well after the amendment had been made to the writ.

For all the above reasons I dismiss the second defendant's application with costs to the plaintiff.

c **The 3rd Application (In Encl. 108)**

This is the second defendant's application to set aside or strike out the plaintiff's amended writ, which it had renewed for a further six months from 30 March 2001 and which the plaintiff served on the second defendant's advocates on 15 May 2001. The second defendant also seeks to set aside the service of the

d same on him. The grounds relied upon by the second defendant in making this application are that:

- (a) this was the 3rd time the plaintiff was serving a writ onto him and so constituted an abuse of process (the first ground);
- e* (b) the amended writ (with extended validity) which was served on him was not marked with an Official Stamp pursuant to Form 5 RHC showing the period for which the validity of the writ had been extended (the second ground);
- f* (c) the amended writ (with extended validity) is not a valid nor properly "sealed" copy (the third ground);
- (d) the plaintiff had failed to amend the note on the amended writ (with extended validity) which states that "This writ may not be served more than twelve months after the above date unless renewed by order of court"
- g* (the fourth ground);
- (e) the service of the amended writ (with extended validity) is invalid since all proceedings against him had been stayed by a court order dated 23 April 2001 which the plaintiff ought to be aware of (the fifth ground).

h I find no merit in any of the five grounds relied on by the second defendant and say so for the following reasons. With regard to the first ground, I do not think that the plaintiff's action, in serving the amended writ, the validity of which had been extended, on the second defendant can be characterised as

i

an abuse of process, as he has sought to portray. Although the second defendant complains about being served with the writ for the “3rd time”, I find that the plaintiff had good reasons for doing so. On the first occasion, when the writ was sent by AR Registered post to the second defendant, the plaintiff was there undertaking personal service of legal process on him. On the second occasion when the writ was served, it was a copy of the amended writ that was served on the second defendant and it is a requirement of the rules (O. 20 r. 1(2) RHC) that where a writ is amended after it has been served, it must be served on each defendant unless the court dispense with such service on application. That is what the plaintiff was doing here. On the third occasion what was served on the second defendant was the amended writ which bore on its face the following endorsement: “Renewed for six months from 30 March 2001 pursuant to court order dated 28 March 2001”. So what was being served was the duly extended writ, in its amended form.

In my view the plaintiff’s action in having done so is understandable. It had already, as a matter of caution, taken steps to extend the validity of the writ after it was sent to the second defendant by AR Registered post on 23 March 2001 as it was uncertain whether the second defendant would personally acknowledge receiving the same. Then when the second defendant did receive the writ, he challenged the service on the ground, *inter alia*, that at the time of service, the writ had expired.

In the circumstances it is understandable that the plaintiff would take steps to serve the duly extended writ in its amended form on the second defendant. I do not see that what the plaintiff did on the third occasion was an abuse of process or as being oppressive, rather I would describe it as a genuine attempt on the part of the plaintiff to show that if for any reason it was held that service on the first occasion was invalid because the writ had expired, then service effected on the third occasion remained valid and effective.

With regard to the second ground, in view of my earlier finding that service of the writ must be regarded as having been properly effected on the second defendant on 28 March 2001 which was a day before its expiry date on 29 March 2001, the fact that the renewed writ did not bear the official stamp in Form 5 of the RHC in its complete form ie, the endorsement about the six months’ renewal was not signed by the Registrar, is only of academic interest since the service of the extended writ in its amended form is quite redundant. Even if it was not, I do not think that the fact that the Registrar had not signed at the bottom of the endorsement regarding the renewal of the writ for another six months vitiated its validity or the service thereof. At most I

- a* would regard the omission as an irregularity which the court, in the exercise of its discretion under O. 2 r. 2 RHC, should forgive because the irregularity could not have occasioned any injustice to the second defendant as it remains an irrefutable fact that what was indorsed on the extended amended writ was true in substance and in fact and even though the Registrar did not sign at the bottom of the indorsement, the attention of anyone reading the indorsement would have been drawn to the fact that the validity of the writ had been extended by an order of court dated 28 March 2001. Besides, the order of 28 March 2001 was served on the second defendant at the same time as the extended amended writ.
- b*
- c* With regard to the third ground, once again, I find that in view of my earlier finding that the writ must be regarded as having been properly served on the second defendant on 28 March 2001, his complaint about not being served with a “sealed” copy of the extended amended writ is academic as such service has been rendered redundant.
- d* Even if it was not, I do not think that there is any substance in the second defendant’s third ground because even where the copy writ or “original” writ is being served, the RHC does not require that a “sealed” copy of writ is served on a defendant. A copy writ chopped with the letters “L.S.” in a circle will suffice. This issue has been fully discussed by me in *Arab-Malaysian Merchant Bank Berhad v. Dominance Resources Sdn Bhd* [2002] 5 CLJ 1 and so no purpose will be served to repeat here what was said there. In my view, the position cannot be any different just because it is an amended writ that is being served. With regard to the submission by counsel for the second defendant that the renewed amended writ bore an “old” “L.S.” chop, I regret that I have found this argument difficult to follow as the document produced in the application is a photo-copy only and I am in no position to say whether the chop is an “old” or “new” chop.
- e*
- f*
- g* With regard to the fourth ground, I again find that as the writ must be regarded as having been properly served on the second defendant on 28 March 2001, the second defendant’s complaint that the plaintiff had not taken steps to amend the note on the extended amended writ which reads, “This writ may not be served more than twelve months from the above date unless renewed by order of court,” is totally irrelevant since the writ was served during its period of validity.
- h*
- i* Even if it is not irrelevant, I do not think the second defendant is correct in taking the point. He has not pointed out to me any provisions in the RHC which requires that the note in question must be amended as he now says it must. In my judgment there is no reason or justification for making an

amendment to the note. I say this because its purpose is to inform that the writ may not be served more than twelve calendar months from its date of issue unless renewed by order of court. Thus, even if a writ has been extended but the note in question has not been amended, anyone upon whom the writ is served would still be able to determine whether he is being served within twelve months from the date of its issue or not, and if it is not, whether the writ has been renewed by order of court from the indorsement on the face of the writ, made in accordance with O. 6 r. 7(3) and not from the amendment to the note in question. I must be excused, therefore, for saying that in my view the second defendant is clutching at straws in taking this point.

With regard to the fifth ground, I find it completely baseless because it does not lie in the mouth of the second defendant to complain about the plaintiff having served the extended amended writ on his advocates on 15 May 2001 even though he had obtained an order to stay all further proceedings against him on 23 April 2001, when he himself is to blame for not having taken any steps to serve the order of stay which had been obtained by him on an *ex parte* application, until 31 May 2001 which was well after the service on him of the extended amended writ.

For all the above reasons, I dismiss the second defendant's three application with costs to the plaintiff.

The 4th Application (In Encl. 12[2])

This is the second defendant's application to set aside the *ex parte* order obtained by the plaintiff on 28 March 2001, extending the validity of the writ for a period of six months from 30 March 2001 for purposes of service. The grounds relied upon by the second defendant in making this application are that:

- (a) there was no proper basis nor material for the plaintiff to apply to extend the validity of the writ (the first ground);
- (b) there was unexplained delay on the part of the plaintiff in serving the writ (the second ground);
- (c) there was non-disclosure of material facts in the plaintiffs *ex parte* application to extend the validity of the writ (the third ground).

I should at once say that in the light of my earlier finding that the writ must be regarded as having been properly served on the second defendant on 28 March 2001, when its validity period had not yet expired, the plaintiff need not have obtained the extension order. Since the plaintiff does not rely on the

- a* extension order of 28 March 2001 but rather the deeming provisions of cl. 24 of the guarantee and O. 10 r. 3(1)(b) RHC to show good and effective service of the writ on the second defendant while it remained valid for service in the first instance, the grounds relied on by the second defendant are academic and serve no real purpose. His application must therefore be dismissed with costs.
- b* If I am wrong in what I say and the plaintiff is not entitled to rely on the deeming provisions in cl. 24 of the guarantee and O. 10 r. 3(1)(b) RHC to show good and effective service, then I would still dismiss the application of the second defendant for the following reasons. In *Lloyd Tirestino Societa v. Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27, the Federal Court
- c* held that the court's jurisdiction to renew a writ should not be exercised in all cases and indiscriminately but only where there are good reasons to excuse the delay in service. In my view, the plaintiff has given good reasons to excuse the delay in service. It was here confronted with a situation where it had twice attempted to serve the second defendant at his Sibu address but for some
- d* inexplicable reasons the AR Cards were returned showing that a company called Umas Sdn Bhd had acknowledged receipt of the mail. It is true that the plaintiff waited some 9 or 10 months before its third attempt at serving the second defendant but this period must be viewed against the fact that the plaintiff had in fact acted promptly after the issue of the writ by attempting to have it served
- e* within 11 days of its issue. It must also not be overlooked that the plaintiff had tried to obtain judgment in default of appearance against the second defendant based on the service at the Sibu address but was prevented from doing so only by the stand taken by the Court Registry. When the facts are viewed in their totality, I think that there were sufficiently good reasons placed
- f* before the Senior Assistant Registrar to enable him to exercise his discretion to renew the validity of the writ.

- With regard to the second defendant's complaint that there had been non-disclosure of material facts in the plaintiff's *ex parte* application for extension, no submissions were made to me on the point but in his affidavit
- g* affirmed on 7 June 2001 in support of the application, the second defendant in para 12 thereof referred to the plaintiff's "third attempt" at service ie, by posting the writ to his Petaling Jaya address by allegedly posting it on 22 March 2001 and said that the plaintiff had failed to disclose when the writ was actually posted. I do not think that such non-disclosure was material at
- h* all because as we know, the date of posting was 23 March 2001 and if such information had in fact been disclosed to the court, I do not think the difference of a day in the date of posting would have made any difference to the application for extension.

i

For all the above reasons I dismiss the second defendant's fourth application with costs to the plaintiff. a

The 5th Application (In Encl. 17[2])

I now turn to consider the 5th application before me, which is the plaintiff's application to set aside the order of stay which the second defendant had obtained on an *ex parte* basis, while applying to enter a conditional appearance to the action. b

It is the plaintiff's contention that the order of stay was improperly obtained by the second defendant because (a) it was obtained on an *ex parte* basis under O. 12 r. 7 RHC which rule does not provide for or authorise the grant of a stay of proceedings, let alone on an *ex parte* basis (the first ground), and (b) on the facts disclosed in the second defendant's application, there were no grounds upon which the inherent jurisdiction of the court under O. 92 r. 4 RHC could be prayed in aid of an order for stay of proceedings. c

With reference to the first ground, the plaintiff referred me to three cases where the High Court discussed the scope of O. 12 r. 7 RHC. In *Tai Choi Yu v. The Government of Malaysia* [1993] 3 CLJ 405 his Lordship Richard Malanjum JC (as he then was) expressed the view that an application made under O. 12 r. 7 RHC ought to be an application "either to set aside the writ, the service of the writ or notice of the writ or to declare that the writ and notice has not been duly served." In other words, an order for stay may not be applied for or obtained under O. 12 r. 7 RHC. A similar view was expressed by Kamalanathan Ratnam J in *Trans Resources Corporation Sdn Bhd v. Sanwell Corporation & Anor (No 2)* [1999] 3 CLJ 215. In *Matchplan (M) Sdn Bhd & Anor v. William D Sinrich & Anor* [2000] 7 CLJ 212 the same learned judge exercised his jurisdiction to set aside the action before him instead of staying it "since O. 12 r. 7 of the RHC does not provide for a stay". d

I think that it is quite clear from the decision in the above three cases that O. 12 r. 7 RHC may not be resorted to by a defendant to obtain a stay of proceedings because the rule itself prescribes the purposes for which it may be used and a stay of proceeding is not one of them. Therefore, if the second defendant had obtained his order for stay under O. 12 r. 7 RHC I would have no hesitation in saying that the order for stay had been improperly obtained. The second defendant recognises this too as he has in his submissions stated that he does not disagree with the principle of law set out in the above three cases I have just referred to. However, it is the second defendant's case that e

f

g

h

i

- a* his *ex parte* application for stay was not made under O. 12 r. 7, but pursuant to the inherent powers of the court under O. 92 r. 4 RHC.

A perusal of the second defendant's application shows that it was made under "O. 12 r. 6 and/or O. 92 r. 4 of the Rules of the High Court 1980" and so I shall proceed to consider whether the order of stay was properly made under O. 92 r. 4 RHC, which states that:

b

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

c

To begin with, it is my view that O. 92 r. 4 is couched in sufficiently wide language to enable a court, in appropriate circumstances, to grant an order for stay of proceedings. In *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd* [2000] 3 CLJ 361 Vincent Ng J thought so as well when he said at p. 367:

d

A further distinction to note is that in stay of proceedings cases the Court's inherent jurisdiction is invoked, whereas applications for stay of execution of judgment are, in our High Courts, governed by a specific provision, being O. 45 r. 11 of the Rules

e

And in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533, his Lordship Gopal Sri Ram JCA said at p. 541:

f

Since the circumstances in which the Court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action amounts to an abuse of the Court's process, it may be struck out or stayed.

g

Thus, while I agree with the second defendant that the court can in an appropriate case grant, in the exercise of its inherent jurisdiction, a stay of proceedings, the matter does not end there because in the context of the present application two further questions arise for determination. They are: (a) could the court be moved *ex parte* for a stay of proceedings?; and (b) if so, had the second defendant made out a case for the exercise of the court's discretion in favour of a stay?

h

With regard to the first question, the second defendant argued that it was perfectly proper for him to move the court *ex parte* because firstly, "the court had on many occasions granted an *ex parte* order for stay where the

i

circumstances are appropriate. The law reports are replete with examples”. The second defendant then cited three cases in support of what he said. I have read the three cases cited but I find that at least two of them do not support the second defendant’s contention. The case of *Chellapa K Kalimuthu v. Sime UEP Properties Bhd* [1999] 3 CLJ 247 concerned an *ex parte* application for a stay of all proceedings made by the plaintiff (applicant) to the Court of Appeal following an order made by the High Court setting aside an *ex parte* injunction obtained by the plaintiff against the defendants in the court below. When the applicant appeared to argue the application before his Lordship Shankar JCA, the learned judge did not entertain the *ex parte* application but instead ordered the applicant to give notice of the application to the defendants and adjourned the hearing to the afternoon of the same day when counsel for the defendant did appear. So I do not regard that case as authority for the proposition that an order of stay may be granted *ex parte*.

The second defendant next referred me to the following passage in *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin* [1996] 2 CLJ 270 at p. 274 CA:

The applicant is a developer of property. One of its proposed developments although approved by the second respondent, met with opposition from the first respondent. Unhappy with the decision of the second respondent’s approval of the applicant’s plans, the first respondent applied to the High Court for leave to move it for an order of *certiorari* to quash the approval in question. The applicant was not made a party to these proceedings. When the first respondent applied for leave, the usual order that leave does operate as a stay was also sought, but the learned judge who heard the application declined to make such an order, indicating to counsel that he may reapply if the circumstances warranted. The circumstances must have so warranted, *for, shortly thereafter, the first respondent applied for and obtained an ex parte order to stay all further proceedings* on the second respondent’s approval. The applicant got wind of the *certiorari* proceedings and, in particular, the order of stay. Its solicitors called for the cause papers and the first respondent’s solicitors obliged by effecting service.

The second defendant relies on the words in italics to show that an order for a stay of proceedings may be made *ex parte*. I do not agree. It is quite clear to me that what was “reapplied” for by the first respondent there was for leave to apply for an order of *certiorari* with the usual order that that leave does operate as a stay of all proceedings. The application was for leave under O. 53 RHC which expressly authorises the application to be made *ex parte*.

The third case referred to me was *Badrul Zaman PS Md Zakariah v. Jabatan Penyiaran Radio dan Televisyen Malaysia* [2001] 2 CLJ 623, where the court granted, on an *ex parte* application, a stay of execution of a default

- a* judgment for RM100 million pending the hearing of an application to set aside the judgment. But with all respect, that was a case in which the *ex parte* order of stay was made without any discussion on whether the order of stay could be granted *ex parte*. In this regard, I would prefer to follow the decision in *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1990] 1 MLJ 317 where VC George J (as he then was) examined the provisions of the RHC generally and some of its rules in particular, to determine what applications may be made *ex parte* to the court. The learned judge concluded there that the general rule is that all applications in chambers have to be made by summons *inter partes* other than applications excluded by the rules from being so brought and, therefore, hearing an application *ex parte* when not authorised by the rules would be tantamount to hearing the application by a procedure independent of the RHC. In the premises I reject the second defendant's contention that an order of stay of proceedings may be applied for on an *ex parte* basis. If I am wrong in what I say, I now go on to consider the second question.

e With regard to the second question ie, whether the second defendant had made out a case for the exercise of the court's inherent powers to grant an order of stay in his favour, he has argued that the justice of the case favoured the grant of the order for stay in view of the fact that he had obtained leave to enter a conditional appearance to set aside the writ and service thereof on him and that pending such hearing unless an order for stay was granted, there would:

- f* (i) be a situation of uncertainty should the plaintiff proceed to an O. 14 application and the question whether he would need to file a defence would arise;
- (ii) if proceedings are allowed to proceed, his application to set aside the writ and or service thereof may be rendered nugatory and compromised;
- g* (iii) the balance of convenience favoured a limited stay because his application to set aside ought to be disposed of first before parties proceed to defence, O. 14 or any other applications.

h I regret that I find all the above arguments without any substance and quite false. In the first place, none of the above assertions were made in his affidavit when applying for a stay. They were, therefore, not the basis upon which the court was being moved to exercise its inherent jurisdiction. In the second place even if they had been, their falsity would have been exposed because once he had been granted leave to enter a conditional appearance, the question of the plaintiff thereafter proceeding to file an application for summary judgment under O. 14 RHC or whether he would need to file a defence simply does not arise,

i

in that, no judgment in default of appearance could have been entered against the second defendant because of his conditional appearance, and, under O. 14 RHC a plaintiff can only proceed with an application thereunder when a defendant “has entered an appearance”, which is not the case here as the second defendant’s appearance is a conditional one which prevents O. 14 RHC operating against him. Likewise the second defendant’s complaint that if proceedings are allowed to proceed, his application to set aside the writ and service thereof may be rendered nugatory or compromised are untenable because if he does succeed in his application and the writ is set aside, then whatever steps the plaintiff may have taken in the proceedings will go with the writ. If the writ is not set aside then he is still entitled to apply to set aside any steps taken in the action, which is precisely what he has done here.

I should also say that it is idle for the second defendant to seek to argue, as he has now done, that he was justified in obtaining the *ex parte* order of stay by relying on events which took place after the grant of the order since it is on the basis of the materials that are placed before it at the time the application is made, that the court acts when granting the order of stay, and not on hindsight.

For all the above reasons, I find that there was no proper basis for the exercise of the court’s discretion to grant a stay of proceedings under its inherent jurisdiction under O. 92 r. 4 RHC.

In the result I allow the plaintiff’s application with costs and set aside the *ex parte* order for stay of proceedings.

The second defendant is given 14 days from the date hereof to file his defence.

a

b

c

d

e

f

g

h

i